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IN THE

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1115 and 74-1228

MARVIN MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

COVINA PUBLISHING COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in No. 74-1115 (Pet. App. A) is reported at 505 F.2d 1247.

The opinion of the court of appeals in No. 74-1228 (Pet. App. A) is reported at 507 F.2d 1100.

JURISDICTION

The judgment of the court of appeals in No. 74-1115 was entered on November 6, 1974. A petition for rehearing was denied on January 6, 1975 (Pet. App. C). On January 27, 1975, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including March 6, 1975 (Pet. App. D). The petition was filed on that date. The judgment of the court of appeals in No. 74-1228 was entered on November 29, 1974. Rehearing was denied on January 27, 1975 (Pet. App. C). On February 19, 1975, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including March 28, 1975 (Pet. App. D) and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. (Both petitions): Whether 18 U.S.C. 1461 and 1462 were unconstitutionally vague prior to the decision in *Miller* v. *California*, 413 U.S. 15.

2. (Both petitions): Whether the claimed vagueness precluded a showing of intent under 18 U.S.C. 1461 and 1462 in a trial occuring prior to this Court's decision in *Hamling* v. *United States*, 418 U.S. 87.

3. (Both petitions): Whether incarceration imposed after convictions for violating 18 U.S.C. 1461

and 1462 constitutes cruel and unusual punishment.

4. (No. 74-1228): Whether petitioner's obscenity conviction under the national community standard is void because a local community standard was not applied.

5. (No. 74-1115): Whether a jury trial is required in all prosecutions under 18 U.S.C. 1461 and 1462.

STATEMENT

1. *No. 74-1228*: In 1968, after a jury trial in the United States District Court for the Central District of California, petitioners were convicted of five counts charging the mailing of obscene matter, in violation of 18 U.S.C. 1461. They were also convicted of two counts charging interstate shipment of obscene matter, in violation of 18 U.S.C. 1462. Petitioner Miller was sentenced to concurrent terms of five years' imprisonment on each count, and fined $2,500 on each of three counts. Petitioner Covina Publishing, Inc., was fined $5,000 on each of three counts. The sentences on the remaining counts were suspended and Covina was placed on five years' probation, on the condition that it obey all local, state, and federal laws, as well as the rules set by the probation officer. The court of appeals affirmed (431 F.2d 655).

On June 25, 1973, the petition for a writ of certiorari was granted, the judgment vacated, and the case remanded to the court of appeals in light of *Miller* v. *California*, 413 U.S. 15, and its com-

panion cases (No. 70-43, 413 U.S. 913).[1] Upon reconsideration, the court of appeals reaffirmed petitioners' convictions *per curiam* (No. 74-1228, Pet. App. A; 507 F.2d 1100).

The government's evidence at trial showed that petitioners were engaged in the sale and distribution of sex-oriented literature. More than thirty witnesses testified that they received or seized the charged materials from the mails and from interstate commerce (see, *e.g.*, 5 R 125-128, 136-138, 152, 207, 218, 233, 277-278, 6 R 316, 328-329; 7 R 498-499, 513-514).[2] These witnesses included teenagers, parents, school employees and women, many

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[1] Petitioner Miller was also the petitioner in *Miller* v. *California*, *supra*. There the judgment was vacated and the case remanded for further consideration. The conviction was reaffirmed and the appeal to this Court was dismissed for lack of a substantial federal question (418 U.S. 915). His appeal from subsequent proceedings in that case is presently before this Court in No. 74-1255.

The companion cases to *Miller* v. *California*, *supra*, are *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49; *Kaplan* v. *California*, 413 U.S. 115; *United States* v. *12 200-Ft. Reels of Film*, 413 U.S. 123; *United States* v. *Orito*, 413 U.S. 139; *Heller* v. *New York*, 413 U.S. 483; *Roaden* v. *Kentucky*, 413 U.S. 496; and *Alexander* v. *Virginia*, 413 U.S. 836.

[2] "R" refers to the record of the trial proceedings.

The materials which petitoners were charged with mailing and shipping were novels entitled "The Traveler's Companion," "The Guilded Lily," "Restless Love," and "The Misfortunes of Mary," books entitled "Female Photographs" and "Intercourse,' a magazine entitled "The Namei s Bonnie," a film entitled "Marital Intercourse," and advertisements giving information as to how the above materials might be obtained.

of whom had not solicited the materials. Others testified that they had never previously ordered sex-oriented materials, or that they had only ordered more conventional types of literature (see, *e.g.*, 5R. 224-226, 236; 6R. 299, 328, 330, 351-352, 357-358). The witnesses also included various postal employees who had either intercepted these materials in transit or who had themselves ordered the publications at the direction of their superiors (see, *e.g.*, 5R. 125-128, 146-147, 179-180, 184, 263-264).

The evidence also showed that approximately 300,000 envelopes containing three or four brochures for sex-oriented material[3] had been prepared and sent out for petitioners by a commercial mailer (8R. 710-712, 720). According to the mailer, these ads were sent to people on a mailing list purchased by Collector's Publication (Covina) (8R. 738). Petitioner Miller testified that between 500,000 and 600,000 ads for the book "Intercourse" were sent out (11R. 1292). He also testified that his mailing list, as well as the ones he purchased, were restricted to those people who had exhibited an interest in sex-oriented material (11 R. 1216, 1219-1220, 1222).

The government called one expert witness, Dr. David Henry Malone, professor and chairman of the Comparative Literature Department at the University of Southern California (8R. 616). In the opinion of Dr. Malone, all four "novels" at issue were di-

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[3] These included brochures for the film "Martial Intercourse," the book "Intercourse," the magazine "The Name is Bonnie" and an item entitled "Man Woman" (8R. 710-712).

rected towards the prurient interest of the reader (8R. 629-630, 634, 637-638, 640). In defense, petitioners produced several expert witnesses. Carolyn See, a doctor of literature, testified that the four "novels" at issue had redeeming social value and that none of the "novels" had as its sole purpose the arousal of sexual interest (9R. 439-840, 851, 858, 867).[4] Peter Wilins, a psychiatrist, testified that the book "Intercourse," the film "Marital Intercourse," and the magazine "The Name is Bonnie" had redeeming social value (10R. 1161-1162, 1165). Fred Goldstein, a doctor of psychology, also testified that the above three items had redeeming social value (10R. 1115-1116, 1119, 1147).

The book, magazines, and advertisements were introduced into evidence and the jury was given copies of the four books to read. (6R. 471-473, 479-480, 483).

2. *No. 74-1115*: In 1971, following a jury-wiaved trial in the United States District Court for the Central District of California, petitioner Miller was convicted of fifteen counts of mailing obscene material in violation of 18 U.S.C. 1461.[5] He was sentenced to two years' imprisonment and fined $22,500. The court of appeals affirmed (455 F.2d 899).

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[4] On cross-examination, Dr. See said that she could not conceive of any novel that is totally without literary merit (9R. 885).

[5] Covina Publishing, Inc., was also charged and convicted in the 1971 trial. Covina did not appeal that conviction.

On June 25, 1973, the petition for a writ of certiorari was granted, the judgment vacated, and the case remanded to the court of appeals for further consideration in light of *Miller* v. *California*, *supra*, and its companion cases (No. 74-1517, 413 U.S. 913). Upon reconsideration, the court of appeals reaffirmed petitioner Miller's conviction (No. 74-1115, Pet. App. A; 505 F.2d 1247).

At the trial a stipulation regarding the testimony of thirty-four prosecution witnesses was presented in lieu of calling and examining the witness (Tr. 8). The substance of the stipulation was that these witnesses would testify that the advertisements charged in the indictment were received either by the addressees or by others at those addresses.* The advertisements were unsolicited. It was also stipulated that employees of the Postal Service received certain books and magazines pursuant to test purchases. The magazines which petitioner was convicted of mailing were entitled "Groovy Gypsy," "Pussy Willow," "Topsey Turvey," "Lovers," "Continental Cuties," "Parley," "Upon," and "Special." The books were entitled "Go Down Bruno," "Love Letters of Lauralee," and "My Sexy Aunt." The magazines contained close-up pictures of female genitals, gen-

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* The advertisements are described in the original opinion of the court of appeals (455 F.2d at 900-901). Some of the addresses were juveniles, and juveniles resided at other addresses where the materials were mailed. The material in one count was sent to a parochial school and the material in another count was sent to a Y.W.C.A. (Tr. 206; 455 F.2d at 901).

erally with legs spread and with bodies in grotesque positions (455 F.2d at 902). The books contained descriptions of sodomy, lesbian sexual acts, incest, and bestiality, including intercourse between a woman and a dog.

The government presented two expert witnesses, a professor of comparative literature and a psychiatrist, who testified that the books and magazines appealed to prurient interest and were utterly without redeeming social value (Tr. 17-23, 45-47). Additionally, Sheldon Heiman, a mail distributor for petitioner, testified that between 65,000 and 75,000 pieces of mail were sent out for petitioner on April 10, 11, and 12, 1969 (Tr. 60-62). The mailed items contained pictures of "males and females in various states of copulation and oral intercourse" (Tr. 61). It was stipulated that approximately 200,000 pieces of mail were entered at the post office for petitioner between June 20 and August 8, 1969 (Tr. 188).

ARGUMENT

1. Petitioners contend that 18 U.S.C. 1461 and 1462 were unconstitutionally vague at the time of their trials, in light of this Court's subsequent decision in *Miller* v. *California*, 413 U.S. 15. This claim is insubstantial. Prior to *Miller*, this Court held that 18 U.S.C. 1461 was not unconstitutionally vague in *United States* v. *Reidel*, 402 U.S. 351 and *Roth* v. *United States*, 354 U.S. 476, 491-492.[1] After

[1] Petitioners' vagueness claim relates to the precision of the tests required to determine what is obscene. On this

Miller, this Court again reaffirmed that 18 U.S.C. 1461, as it had been construed prior to *Miller*, was not unconstitutionally vague. *Hamling* v. *United States*, 418 U.S. 87, 110-115. In *Hamling* this Court stated: "[a]t no point does *Miller* or any of the other obscenity decisions decided [during the 1972 Term] intimate that the constitutionality of pre-*Miller* convictions under statutes such as 18 U.S.C. § 1461 was to be cast in doubt." 418 U.S. at 112.

Petitioners urge that even if the federal obscenity statutes were and are constitutional, their convictions must be reversed because materials similar to those involved here have been found not to be obscene in other decisions.[8] The claim is groundless. That petitioners may have misplaced their reliance on other decisions does not provide immunity from criminal liability. If a person, purportedly relying on judicial decisions, commits acts prohibited by the criminal law, he does so at his peril. See *United States* v. *Wurzbach*, 280 U.S. 396, 399.

Under the assumption that the materials here were not obscene prior to *Miller* and *Hamling*, petitioners urge that after *Miller* the obscenity statutes become *ex post facto* laws. They reason that the abrogation by *Miller* of the "socially redeeming value" test deprived them of an available defense. But the ma-

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point, there is no reason to distinguish section 1462, which prohibits, *inter alia*, interstate shipment of obscene matter, from section 1461, which prohibits mailing of such material.

[8] Petitioners do not cite any of the decisions to which they refer (Pet. No. 74-1228 11; Pet. No. 74-1115 9).

terials involved here were found to be obscene prior to *Miller*,[9] and *Miller* did not make any conduct criminal which was previously non-criminal. *Hamling* v. *United States*, *supra*, 418 U.S. at 116. Furthermore, the court of appeals examined the materials in light of *Miller* and again found them to be obscene (No. 74-1115, Pet. App. A; 505 F.2d 1247; No. 74-1228, Pet. App. A; 507 F.2d 1100). Thus petitioners' *ex post facto* contention is without substance.[10]

2. Petitioners urge that the government failed to prove that they knew the materials were legally obscene, and that such knowledge is an essential element of the offenses. That claim was, however, rejected in *Hamling* v. *United States*, *supra*, 418 U.S. at 123-124:

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[9] We rely upon the original opinions of the court of appeals, which found the materials to be obscene under pre-*Miller* standards (455 F.2d at 902; 431 F.2d at 658-659). We note that in No. 74-1228, petitioners challenged the obscene character of only one of the magazines at issue in the original appeal (431 F.2d at 658).

[10] Relying on *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, petitioners erroneously contend that the materials involved here could only be seized for forfeiture, and could not constitute the subject of criminal prosecutions (Pet. No. 74-1115 at 10-11; Pet. No. 74-1228 at 12-13). *Calero-Toledo* holds that pre-seizure notice and hearing are not required in forfeiture proceedings, and that such proceerings are not unconstitutional when applied to the property interests of innocent parties. Nothing in that opinion suggests that *Hamling* v. *United States*, *supra*, *Miller* v. *California*, *supra*, and *Roth* v. *United States*, 354 U.S. 476, apply only to forfeiture cases.

> It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials. To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed upon the law. Such a formulation of the scienter requirement is neither required by the language of 18 U.S.C. 1461 nor by the Constitution.

Petitioners' knowledge of the nature and character of the materials is not disputed. Thus, they can not avoid conviction by claiming that they believed their acts to be lawful. See *United States* v. *Wurzbach*, *supra*, 280 U.S. at 399, quoted in *United States* v. *Hamling*, *supra*, 418 U.S. at 124.

3. Petitioner Miller contends that imprisonment for violations of the obscenity statutes constitutes cruel and unusual punishment because such statutes have been the subject of "controversy and confusion" (Pet. No. 74-1115 17; Pet. No. 74-1228 15). The court below in No. 74-1228 properly characterized the contention as frivolous (Pet. App. A at 2; 507 F.2d at 1101). Disagreement as to the scope of statutes may give rise to challenges to their application in a particular case, but it does not make imprisonment for violation of their terms, as properly applied, cruel and unusual punishment. See *United States* v. *Hamling*, 481 F.2d 307, 312 (C.A. 9), affirmed, 418 U.S. 87. See also *United States* v. *Hill*, 500 F.2d 733, 740 (C.A. 5).

4. In No. 74-1228, petitioners contended that they are entitled to a new trial in order to introduce evidence of local community standards in light of the obscenity test articulated in *Miller* v. *California*, *supra*. Petitioners were, of course, tried prior to the *Miller* decision, and the jury's instructions were properly based on a national standard under the *Roth-Memoirs* test of obscenity then in effect.[12]

Petitioners' claim is foreclosed by this Court's decision in *Hamling* v. *United States*, 418 U.S. 87, which involved obscenity convictions that occured, and were affirmed by the court of appeals, prior to *Miller*. In *Hamling* this Court held that the *Miller* decision "did not require as a constitutional matter the substitution of some smaller geographical area into the same sort of formula * * *," but that whether a national or local standard is used, the jury's determination must be objective and not subjective. *Hamling* v. *United States*, *supra*, 418 at 104. Petitioners do not claim that the materials here were judged by a subjective rather than an objective standard.

The jury found the materials to be obscene under the *Roth-Memoirs* test, and, but for one magazine, that finding was not challenged in the court of appeals. On remand, the court of appeals found the materials also to be obscene under the *Miller* formulation (No. 74-1228, Pet. App. A). In these circumstances, it is not necessary that a new trial be held so that a jury may determine the obscene nature of

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[12] *Roth* v. *United States*, 354 U.S. 476; *Memoirs* v. *Massachusetts*, 383 U.S. 413.

the materials under *Miller*. See *United States* v. *Ratner*, 502 F.2d 1300, 1302 (C.A. 5) (*per curiam*) petition for writ of certiorari pending, No. 74-1282; *United States* v. *Alexander*, 498 F.2d 934, 936 (C.A. 2); *United States* v. *Groner*, 494 F.2d 299 (C.A. 5), certiorari denied, November 11, 1974, No. 73-1932.

The court of appeals properly made an "independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected." *Jacobellis* v. *Ohio*, 378 U.S. 184, 190.

5. In No. 74-1115, petitioner Miller presents the following question (Pet. 3):

> Whether a jury trial is constitutionally mandated in every Federal prosecution brought pursuant to Title 18, U.S.C., §§ 1461 and 1462?

Petitioner waived a trial by jury and does not challenge that waiver. Thus, he has no standing to raise this issue. In any event, the contention is insubstantial. Nothing in the language or legislative history of 18 U.S.C. 1461 and 1462, or in any of this Court's decisions, suggests that trial by jury is mandated in obscenity prosecutions.

Petitioner further urges that a California jury could not constitutionally find the materials here to be obscene.[13] According to petitioner, the California Supreme Court held that "lewd exhibition of genitilia" is not obscene as a matter of law in *People* v. *Noroff*, 67 Cal. 2d 791, and *In Re Panchot*, 70 Cal. 2d 105, and he asserts therefore that a California

[13] Petitioner presumably intends this argument to apply equally to the bench trial here.

jury could not find the materials involved here to be obscene.

Petitioner, however, misconceives the relationship between state and federal law. However, California courts may construe state obscenity statutes,[14] their construction would not be binding in federal prosecutions. Moreover, in the California decisions cited by petitioner, nude photographs were found not to be obscene because they did not involve sexual acticity. *People* v. *Noroff*, *supra*, 67 Cal. 2d at 794-795; *In Re Panchot*, *supra*, 70 Cal. 2d at 108-109. The original opinion of the court of appeals shows that the materials which petitioner was convicted of mailing in No. 74-1115 dealt with sexual activity. 455 F.2d 899.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writ of certiorari should be denied.

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[14] The California decisions cited by petitioner involved a construction of the term "obscene" as used in Cal. Penal Code, Section 311.

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